antee. Polimex claimed repayment of $25,000 under the guarantee on the ground that delivery had not been made. The plaintiff applied for an injunction to restrain Polimex from claiming under the guarantee. The Court of Appeal decided that it would be wrong for the court to interfere with Polimex's apparent right under the guarantee to seek payment from the bank. See also *Intraco Ltd* v *Notis Shipping Corp of Liberia ('The Bhoja Trader')*.[9]

Following the authorities I have just cited, I am of the view that the defendant in the present case is entitled to demand payment under the terms of the security guarantee. There is no evidence of fraud in this case. The injunction granted on 6 May 1986 is therefore set aside. The senior assistant registrar will hold an enquiry as to damages suffered by the defendant as a result of the injunction and the plaintiff is ordered to pay such damages as assessed to the defendant. The costs of this application shall be paid by the plaintiff to the defendant.

Application allowed.

Solicitors: *Satchi & Co; Ranjit Thomas & Kula.*

Reported by *Yap Shao Sin*

Bank Bumiputra Malaysia Bhd v Fu Lee Development Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO D4-23-3162-87
ZAKARIA YATIM J
10 SEPTEMBER 1990

Banking — Guarantee — Whether the plaintiff's action against the second defendant as guarantor was time-barred — Whether there was a variation of the terms of the principal contract without the second defendant's consent — Limitation Act 1953 — Contracts Act 1950, s 86

Civil Procedure — Limitation — Guarantee — Action against guarantor — When cause of action accrues — Time to run from date of letter of demand

This was an appeal by the plaintiff against the decision of the senior assistant registrar who had ordered their application for summary judgment to be dismissed with costs. The plaintiff by a letter dated 14 December 1978 granted to the first defendant an overdraft facility for a period of two years. The second defendant signed a letter of guarantee on 18 December 1978 as one of two guarantors for the facility. The first defendant failed to make repayments on the due date, 14 December 1980.

The second defendant argued that, as the expiry date of the facility was 14 December 1980, the six-year period started to run from 15 December 1980 being the date that the plaintiff's cause of action arose since no demand was required to initiate the suit against the first defendant. Consequently, the second defendant argued that when the principal contract was determined so was the guarantee and since the present suit was filed on 16 September 1987 a period of six years and nine months had expired and thus the plaintiff was time-barred. The second defendant also raised the allegation that there was a variation in the terms of the principal contract in that the plaintiff allowed the facility to extend to a period of about nine years without the consent of the second defendant. The plaintiff argued that even though the extension of the duration of the facility was a variation of the principal contract such variation was unsubstantial and did not discharge the second defendant from liability.

Held, allowing the plaintiff's appeal and entering summary judgment against the second defendant:

(1) Where there is a covenant or promise to pay a collateral sum on demand, such as covenant by a surety for the principal debtor, a request must be made before an action is brought or before the money can be considered as owing by the collateral debtor.

(2) Here, the guarantee provided that the second defendant would pay the plaintiff 'on demand'. Hence, when the plaintiff made a demand on 29 July 1987 on the second defendant a cause of action arose against him and time therefore only started to run from the date of the plaintiff's letter of demand for the purpose of the Limitation Act 1953. Since the present suit was filed on 16 September 1987 the plaintiff's claim against the second defendant was not time-barred.

(3) The extension of the period of the overdraft facility did not prejudice the first defendant and was in fact an advantage to the first borrower as well as to the guarantors and hence was an unsubstantial alteration. Furthermore, the unsubstantial nature of the variation was self-evident in the present case. Consequently, the second defendant was not discharged as a guarantor by such unsubstantial variation.

(4) Moreover, there was a time and indulgence clause in the letter of guarantee which made it clear that the extension of the period of the overdraft facility without consent of the second defendant did not discharge him from his liability under the guarantee.

[Bahasa Malaysia summary

Ini adalah satu rayuan oleh plaintif terhadap keputusan penolong kanan pendaftar yang memerintahkan permohonan mereka untuk penghakiman terus ditolak dengan kos. Melalui surat bertarikh 14 Disember 1978 plaintif memberikan kepada defendan pertama satu kemudahan overdraf untuk tempoh dua tahun. Defendan kedua menandatangani satu surat jaminan pada 18 Disember 1978 sebagai satu daripada penjamin bagi kemudahan itu. Defendan pertama gagal membuat bayaran pada hari yang dipersetujui, 14 Disember 1980.

Defendan kedua menghujah bahawa, memandangkan yang tarikh tamat kemudahan itu adalah 14 Disember 1980, tempoh enam tahun mula berjalan dari 15 Disember 1980, tarikh kausa tindakan plaintif berbangkit sebab tiada tuntutan diperlukan untuk memulakan dakwaan terhadap defendan pertama. Lantaran itu, defendan kedua menghujah bahawa apabila kontrak utama ditamatkan begitu juga jaminan itu dan oleh kerana saman ini difailkan pada 16 September 1987, tempoh enam tahun dan sembilan bulan telah berlalu dan sebab itu plaintif dibatasi masa. Defendan kedua juga membuat dakwaan bahawa terdapat perubahan dalam terma kontrak utama kerana plaintif membenarkan kemudahan itu berterusan selama kira-kira sembilan tahun tanpa persetujuan defendan kedua. Plaintif menghujah bahawa walaupun perlanjutan tempoh kemudahan itu adalah satu perubahan kontrak utama, perubahan sedemikian tidak substansial dan tidak melepaskan defendan kedua daripada tanggungan.

Diputuskan, membenarkan rayuan plaintif dan memasukkan penghakiman terus terhadap defendan kedua:

(1) Apabila terdapat waad (covenant) atau perjanjian untuk membayar satu jumlah kolateral bila diminta, waad sedemikian oleh seorang penjamin bagi penghutang utama, satu permintaan mesti dibuat sebelum satu tindakan dibawa atau sebelum wang boleh disifatkan sebagai terhutang oleh penghutang kolateral.

(2) Di sini, jaminan memperuntukkan bahawa defendan kedua akan membayar plaintif 'atas permintaan'. Dari itu, bila plaintif membuat tuntutan pada 29 Julai 1987 keatas defendan kedua, satu kausa tindakan berbangkit terhadapnya dan masa oleh sebab itu hanya mula berjalan dari tarikh surat permintaan plaintif bagi tujuan Akta Had Masa 1953. Oleh sebab saman ini difailkan pada 16 September 1987 tuntutan plaintif terhadap defendan kedua tidak dibatasi masa.

(3) Perlanjutan tempoh kemudahan overdraf tidak memudaratkan defendan pertama dan sebenarnya merupakan faedah kepada peminjam pertama dan penjamin dan oleh sebab itu adalah perubahan yang tidak substansial. Tambahan pula, hakikat bahawa perubahan itu tidak substansial adalah ketara dengan sendirinya dalam kes ini. Oleh kerana itu, defendan kedua tidak dilepaskan sebagai penjamin oleh perubahan yang tidak substansial itu.

(4) Lagipun, terdapat klausa 'time and indulgence' dalam surat jaminan yang menjelaskan bahawa perlanjutan tempoh kemudahan overdraf tanpa persetujuan defendan kedua tidak melepaskannya dari tanggungan di bawah jaminan itu.]

Cases referred to

1 *Nasri* v *Mesah* [1971] 1 MLJ 32 (distd)
2 *Nadefinco Ltd* v *Kevin Corp Sdn Bhd* [1978] 2 MLJ 59 (distd)
3 *Sim Siok Eng* v *Kong Ming Bank Bhd* [1980] 2 MLJ 21 (distd)
4 *Re J Brown's Estate*[1893] 2 Ch 300 (follD)
5 *Bradford Old Bank Ltd* v *Sutcliffe* [1918] 2 KB 833 (follD)
6 *Wee Kee Puan* v *Oversea-Chinese Banking Corp Ltd* [1982] 1 MLJ 64 (follD)
7 *MS Amiruddin* v *Thomco's Bank, Ltd* AIR 1963 SC 746 (follD)
8 *Malayan Banking Bhd* v *Yap Seng Kee & Ors* [1988] 1 MLJ 313 (follD)

Legislation referred to

Contracts Act 1950 s 86

Pawancheek bin Marican for the plaintiff.
S Roy (Cik) for the second defendant.

Cur Adv Vult

Zakaria Yatim J: This is an appeal by the plaintiff against the decision of the senior assistant registrar given on 24 August 1988, ordering that their application for summary judgment against the second defendant be dismissed with costs.

There are three defendants in this suit. The first defendant, a limited company, was granted an overdraft facility for $1,600,000 by the plaintiff for a period of two years, vide a letter of approval dated 14 December 1987. By a letter of guarantee dated 18 December 1978 the second and third defendants jointly and severally guaranteed the repayment of the overdraft facility to the plaintiff.

The second defendant, in his statement of defence, admits executing the letter of guarantee. He avers that by reason of the first defendant's default in repaying the loan by 31 December 1980 the said guarantee became effective and enforceable, but since the period of limitation had expired sometime before 31 December 1986 the said guarantee ceased to be binding or enforceable against him. According to him the letter of guarantee is null and void and unenforceable. In his affidavit affirmed on 12 August 1988 the second defendant states:

> I admit being a guarantor for the loan granted by the plaintiff to the first defendant by the letter of approval dated 14 December 1978 and the terms therein ...

It is not in dispute that the plaintiff, by a letter dated 14 December 1978 granted to the first defendant an overdraft facility of $1,600,000 under account number 001-12646-91 for a period of two years. It is not in dispute that the first defendant had defaulted in the terms of the overdraft facility in that they failed to make repayments on the due date, that is 14 December 1980 or soon thereafter. It is also not in dispute that the second defendant signed the letter of guarantee on 18 December 1978 as one of the two guarantors for the overdraft facility. Both counsel for the plaintiff and counsel for the second defendant asked the court to decide on one point only, viz whether the plaintiff's action against the second defendant was time-barred. In the course of their submissions, however, they also touched on the allegation made by the second defendant that there had been a variation in the terms of the letter of approval. I shall deal with the question of limitation first.

Miss S Roy submitted that under the letter of approval dated 14 December 1978 the facility was granted for a period of two years. The expiry date was 14 December 1980. According to her, the six-year period started to run from 15 December 1980 which, she said, was the date that the cause of action arose. She then cited *Nasri* v *Mesah*[1] where the Federal Court held that a cause of action on a contract accrued on the date of the breach and in the case of actions founded on contact, the time ran from the breach. In my view *Nasri*'s case, applies to the borrower, who is the first defendant in the instant case but does not apply to the second defendant. The next case cited was *Nadefinco Ltd* v *Kevin Corp Sdn Bhd.*[2] In that case the Federal Court held that the cause of action accrued the instant the mining company failed to pay the first instalment due. The action was barred by limitation as it was commenced more than six years after the cause of action had arisen. In that case a contract was entered into between the plaintiff, the mining company and the defendant and two others. Under the contract the mining company was to pay the plaintiff monthly instalments and the first instalment was to be paid on 20 January 1968. The three defendants jointly and severally guar-

anteed the repayment of the money to the plaintiff in the event of default. In that case it was the term of the contract that the cause of action against the guarantors accrued as soon as the defendants failed to pay the first instalment due. The next case relied upon by the second defendant was *Sim Siok Eng* v *Kong Ming Bank Bhd.*[3]

In that case the Federal Court held that time ran from the date of the loan or from the last payment of interest or part payment of capital and accordingly the bank's claim on the overdraft was statute-barred. The bank appealed against the decision of the Federal Court to the Privy Council and the Privy Council allowed the appeal. The facts of that case were that the bank had given an unsecured overdraft facility to the appellant. Subsequently on 20 August 1970 the overdraft facility was increased to $90,000 limit and by 28 June 1971, he was overdrawn in the sum of $259,957.12 inclusive of interest. The account remained dormant until 4 November 1974 when the appellant paid the bank $65,000. On 4 April 1978, the bank's solicitors demanded payment of the balance owing and on 7 April 1978 the bank issued the writ against the appellant. The Privy Council decided that time began to run from the time the appellant made payment on 4 November 1974 and the bank was not time-barred when the action was commenced. It is to be noted that *Siok Eng*'s case[3] did not involve guarantors.

Miss S Roy submitted that in the present case, the cause of action accrued against the first defendant on 14 December 1980. She said that no demand was required to initiate a suit against the borrower. She added that since the present suit against the borrower was filed on 16 September 1987, a period of six years and nine months had expired and accordingly the plaintiff was time-barred. She contended that when the principal contract was determined, so also was the guarantee itself.

In my view the cases relied upon by Miss S Roy are not relevant to the present case. The situations in those cases are different from that in the present case.

In the present case, the letter of guarantee states:

> *In consideration of you having agreed* to advance credit facilities to *Fu Lee Development Sdn Bhd* ... up to the sum of ringgit: one million six hundred thousand only ($1,600,000) ... with interest thereon ... *We Ahmad Sobri HA Tajuddin* ... *and Mohammad Bin Hamzah* ... (hereinafter called 'the guarantor/s') *hereby agree with and jointly and severally guarantee you as follows:*
>
> 1 ... 'We will pay you on demand as follows:
>
> (i) The sum of ringgit: one million six hundred thousand only ($1,600,000) ... and any part of the moneys hereby guaranteed which is now or shall at any time be owing or remain due and unpaid to you from the borrowers ...' (Emphasis added.)

It is clear from the terms of the letter of guarantee quoted above that the plaintiff is only entitled to claim up to $1,600,000 together with interest if a demand is made to the second defendant for the payment of such sum with interest. A letter of demand dated 29 July 1987 was sent by the plaintiff through their solicitors to the second defendant by AR Registered Post. It is not in dispute that the letter was duly received by the second defendant. The said letter is reproduced below:

> YB Dato Muhammad bin Hamzah
> Lot 3.21, 3rd Floor,
> Pertama Kompleks
> Jalan Tuanku Abdul Rahman
> 50100 Kuala Lumpur AR Registered
>
> Dear Sirs,
>
> Re: Secured Overdraft for $1,800,000
> Account No 001-16246-91
> Joint and Several Guarantee for $1,600,000
>
> ---
>
> We act for Bank Bumiputra Malaysia Bhd of Menara Bumiputra, Jalan Melaka, Kuala Lumpur.
>
> We have been instructed by our client that there is an outstanding amount of $1,719,322.21 under account No 001-12646-91 in respect of an overdraft facility granted by our client to Fu Lee Development Sdn Bhd, inclusive of interest as at 15 November 1986 and further interest continuing at the rate of 5.5% above our client's base lending rate (which is currently at 9.75% per annum) from 16 November 1986 until full settlement thereof.
>
> We have been instructed that you have jointly and severally executed a letter of guarantee for $1,600,000 on 18 December 1978 whereby you guaranteed the repayment of any moneys advanced by our client to Fu Lee Development Sdn Bhd which remain due and unpaid to our client by Fu Lee Development Sdn Bhd.
>
> Take notice that we have been instructed to demand which we hereby do that you settle the said sum of $1,719,322.21 and interest continuing thereon at the rate of 5.5% above our client's base lending rate (which is currently at 9.75% per annum) from 16 November 1986, within fourteen (14) days of the date hereof failing which we have instructions to institute legal proceedings against you for the recovery thereof without any further notice to you.
>
> Yours faithfully,
> Sgd

In my opinion, when the above demand was made to the second defendant a cause of action arose against him. Therefore time started to run from the date of the letter of demand for the purpose of the Limitation Act 1953. Since the present suit was filed on 16 September 1987 the plaintiff's claim against the second defendant is not time-barred.

Where there is a covenant or promise to pay a collateral sum on demand, such as a covenant by a surety for the principal debtor a request must be made before an action is brought or before the money can be considered as owing by the collateral debtor. See *Re J*

Brown's Estate.[4] In *Bradford Old Bank Ltd* v *Sutcliff*,[5] the English Court of Appeal decided that the plaintiff's claim was not barred by the statute of limitations, as no cause of action arose against the surety until demand had been made by the plaintiffs. *Bradford's* case[5] has been cited with approval by the Federal Court in *Wee Kee Puan* v *Oversea-Chinese Banking Corp Ltd.*[6] In its judgment in that case, the Federal Court said at p 65:

> It is settled law that for the purpose of the statute of limitation as regards overdraft the cause of action against the borrower arises everytime an advance is made by the bank and that no demand for repayment of debt is necessary for the accrual of the cause of action, unless there is a term in the overdraft agreement requiring such notice — *Parr's Banking Co Ltd* v *Yates* [1898] 2 QB 460, *Bian Chiang Bank Bhd* v *Kwong Hing Cheong* [1978] 2 MLJ 193. On the other hand the cause of action against a person who stood as a surety for an overdraft facility only accrues when a demand for repayment is made to the surety. *Bradford Old Bank Ltd* v *Sutcliffe* [1918] 2 KB 833.

Besides raising the question of limitation, the second defendant also alleged that there was a variation in the terms of the letter of approval in that the plaintiff allowed the overdraft facility to extend to a period of about nine years without the consent of the second defendant. Encik Pawancheek argued that even though the extension of the duration of the overdraft facility was a variation of the principal contract, such variation was unsubstantial and did not discharge the second defendant from liability.

Section 86 of the Contracts Act 1950 states:

> Any variance, made without the surety's consent, in the terms of contract between the principal debtor and the creditor, discharges the surety as to transactions subsequent to the variance.

The above section is in pari materia with s 133 of the Indian Contract Act 1872. The Indian Supreme Court has interpreted the words 'any variance' to mean substantial variation. In *MS Amiruddin* v *Thomco's Bank Ltd*,[7] Hidayatullah J, in his judgment at p 753 said:

> ... the law now accepts that unsubstantial alterations which are to the benefit of the surety do not discharge the surety from liability. Of course, if the alteration is to the disadvantage of the surety, or its unsubstantial character is not self evident, the surety can claim to be discharged. The court will not then enquire whether it in fact harmed the surety ...

The question that arises here is what constitutes unsubstantial alteration. In *Amiruddin's* case,[7] Sarkar J in his judgment at p 750 said that '... an alteration in an instrument which is not to the prejudice of a party to it is not a material alteration ...'. Such alteration must be to the advantage of the guarantor and not to his disadvantage. Finally unsubstantial alteration must be self evident.

In my opinion the variation, if any, in the terms of the letter of approval in the present case is not a substantial variation. The extension of the period of the overdraft facility did not prejudice the original borrower. On the other hand it was an advantage to the borrower as well as to the guarantors. Furthermore the unsubstantial nature is self evident in this case. In the circumstances the second defendant is not discharged as a guarantor by such unsubstantial variation.

Encik Pawancheek further contended that if at all there had been a variation of the principal contract, it was not necessary to obtain the prior consent of the second defendant in view of cl 3(iv) in the letter of guarantee. Miss S Roy, on the other hand, argued that the time or indulgence allegedly granted to the borrower amounted to a substantial variation which prejudiced the position of the second defendant.

Clause 3 (iv) of the letter of guarantee clearly states:

> This guarantee shall be without prejudice to and shall not be affected nor shall I/we (or any of us) be released or exonerated by any of the matters following:
> ...
>
> (iv) Any time given or extended to the borrower and/or any other security instruments guarantee or contract or any other indulgence granted to or compromise composition or arrangement made with the borrower and/or any other person or persons whether with or without consent or notice to us.

It is clear from the terms of the time and indulgence clause quoted above, the extension of the period of the overdraft facility without the consent of the second defendant did not discharge him from his liability under the guarantee. In *Malayan Banking Bhd* v *Yap Seng Kee & Ors*,[8] Mohamed Yusoff J (as he then was) considered a similar time and indulgence clause in the letter of guarantee and decided that the plaintiff was entitled to vary the securities, which had been agreed to by the defendants or to grant whatever indulgence to the companies without obtaining the consent of the defendants. In that case the variation alleged was that the various disbursements of the facilities granted to the borrowers were not in accordance with the terms of the letters of approval. I respectfully agree with the decision of Mohamed Yusoff J.

For the reasons stated above I allow the appeal with costs and order that summary judgment be entered against the second defendant as prayed in the statement of claim.

Appeal allowed.

Solicitors: *Wan Marican Hamzah & Shaik; Gill & Tang.*

Reported by *Yap Shao Sin*